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No. 92-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,
Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE MARINE TECHNOLOGY SOCIETY IN SUPPORT OF PETITIONER

JOHN R. CRUMPLER, JR.
(*Counsel of Record*)
KAUFMAN & CANOLES, P.C.
NationsBank Center
Norfolk, Virginia 23514
(804) 624-3103
Counsel for Amicus Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE MARINE TECHNOLOGY SOCIETY IN SUPPORT OF PETITIONER

The Marine Technology Society hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondents have refused consent.

Founded in 1963, the Marine Technology Society ("MTS") is an international professional society, devoted to ocean and marine engineering, science, and policy. The Society's members possess expertise in all of the disciplines involved in exploring, studying, and responsibly utilizing the world's seas. As an institution, MTS represents a broad array of marine-related interests, including businesses and industries, uniformed services, higher education, and agencies at all levels of federal, state/provincial, and local government. While marine technology is of vital concern to MTS, the Society's knowledge and in-

terests extend to the broad range of concerns implicated by the use of the marine environment as a resource for human betterment.

Exploration of long-lost and abandoned shipwrecks is essential to deep-sea exploration and provides a vehicle for continued technological inventiveness. Like new eras of human discovery in the past, the revolutionary age of underwater exploration has stemmed from the freedom and incentives of individuals to explore. Since World War II, there has been a great increase in the pace of opportunities for individuals to participate in underwater discovery. However, the discovery and recovery of submerged and maritime historical cultural resources depends heavily on advanced and costly specialized technologies. Financial incentives have often provided impetus for many of the needed technological innovations.

The decision below makes uncertain and unpredictable the financial incentives associated with technologically advanced discovery and recovery of material in the deep ocean. As a practical matter, it will be difficult, if not impossible, to attract the kind of responsible investors needed to underwrite the combination of scientific investigation, historical analysis and entrepreneurship exemplified by the *S.S. Central America* Project.

Moreover, the uncertainty regarding the applicable body of law creates the very real risk that future explorers will not enjoy the fruits of their exploration because they may be confronted with possibly hundreds of claims by those purporting to be successors-in-interest of former owners and insurers of long-lost shipwrecks, all claiming to be "owners," and the unfortunate explorers may be forced to bear the enormous legal and economic burden of disproving a multitude of stale claims. Thus, the decision below also threatens future exploration by subjecting explorers to a host of lawsuits, many of which may be based on evidence scores of years old, and by placing upon the explorer the burden of disproving speculative claims.

MTS believes that exploration and recovery of ocean resources—cultural and natural—should be encouraged, not inhibited. MTS is deeply concerned that if the Fourth Circuit's decision is allowed to stand, it may well jeopardize responsible research and exploration of the seas.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

JOHN R. CRUMPLER, JR.
(Counsel of Record)
KAUFMAN & CANOLES, P.C.
NationsBank Center
Norfolk, Virginia 23514
(804) 624-3103
Counsel for Amicus Curiae

February 16, 1993

QUESTION PRESENTED

May admiralty courts continue to infer abandonment of long-lost shipwrecks from the passage of many decades, non-use, and all other relevant facts and circumstances, and accordingly award ownership of a shipwreck to those who discover, recover and conserve it under the law of finds; or must courts award title to purported insurers and their successors who claim ownership of a shipwreck under the law of salvage on grounds that abandonment can never be found absent clear and convincing evidence that the purported owners expressly renounced title?

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BRIEF AMICUS CURIAE OF THE MARINE TECHNOLOGY SOCIETY IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Marine Technology Society ("MTS") is an international professional society, devoted to ocean and marine engineering, science, and policy. Since its founding in 1963, MTS has been working toward the following objectives: (1) disseminating marine science and technical knowledge; (2) promoting and supporting education for marine scientists, engineers, and technicians; (3) advancing development of the tools required to explore, study, and utilize the oceans responsibly; and (4) providing services that create a broader understanding of the relevance of the marine sciences to other technologies, arts, and human affairs. Thus, while marine technology

is of vital concern to MTS, the Society's knowledge and interests extend to the broad range of concerns implicated by the oceans as a resource for human betterment.

The Society's members possess expertise in all of the disciplines involved in exploring, studying and responsibly utilizing the world's oceans. As an institution, MTS represents a broad array of marine related interests, including businesses and industries, uniformed services, higher education, and agencies at all levels of federal, state/provincial, and local government. The Society is vertically integrated as well; its membership ranges from CEO's, officers, and administrators, to professional engineers, scientists, and technicians.

THE PETITION FOR CERTIORARI SHOULD BE GRANTED

I. THE ISSUES ARE IMPORTANT AND WILL INCREASE IN SIGNIFICANCE

Although the world's system of oceans comprises nearly three-fourths of the surface of the earth, this watery regime remains largely unexplored because the hazards of doing so are significant and frequently unpredictable. Although the decision below, *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992), focuses on location and recovery of cultural resources, such as shipwrecks, the technology for such efforts is often similar to, and may impinge upon, location and recovery of natural resources on the seabed. Life threatening risks and extensive economic costs inhibit the discovery, management, and recovery of the sea's cultural and natural resources because they limit exploration to those governments and large enterprises able and willing to invest significant resources. To these existing inhibitions, the recent decision of the court of appeals adds a further deterrent to the few entrepreneurs capable of locating and recovering valuable cultural and natural resources from the ocean depths—the uncertainty of ownership. MTS believes that ex-

ploration and recovery of ocean resources—cultural and natural—should be encouraged, not inhibited, and accordingly asks the Court to grant a writ of certiorari to address the weighty issues presented.

A. Dramatic Developments in Technologies for Exploring and Utilizing the Marine Environment Have Made Conflicts in Applicable Federal Maritime Law Intolerable

The effort to locate, recover, and conserve the *S.S. Central America* provides a microcosm of the widespread significance of developing marine technologies. The *S.S. Central America* shipwreck lies on the seabed, nearly two miles below the surface.

Search theory and technology were critical to finding the location of the *S.S. Central America.* Columbus-America Discovery Group compiled a "data correlation matrix" the size of a bedroom—12 feet long by 12 feet wide—with every fact about the event listed horizontally and a timetable printed vertically. They took it to Larry Stone, who had helped find the lost U.S. submarine *Scorpion.* Building computer models of hundreds of sinking scenarios based on wind speeds, currents, and the *Central America*'s last known coordinates, Stone came up with a 1,200 square-mile rectangle of the Atlantic most likely to contain the wreck. The area—the size of Rhode Island—was broken into half-square-mile "cells", and most of the cells were assigned a number between 1 and 10,000 corresponding to the probability of it being the final resting place of the ship. To search the area, Columbus-America Discovery Group used side-scan sonar.

To conduct delicate operations in the extreme cold and crushing pressure of the deep ocean, Columbus-America Discovery Group designed *Nemo*, an innovative, unmanned, deep-ocean excavation vehicle. Because so little is known about the deep ocean environment, every piece

of information that can be recovered is essential to understanding such wrecksites and finding sunken resources.

With its robotic arms and tactile manipulators, *Nemo* can retrieve pieces of gold smaller than a dime. The vehicle uses archaeological tools, including a hydraulic dustpan and water jet, to recover delicate artifacts. It even employs a silicon injection system to solidify contiguous objects so that their relative positions are preserved when they are removed together from the ocean floor. *Nemo* also deploys a variety of instruments and sampling devices around the wrecksite.

People use both eyes to see the world in three dimensions. The remote controlled robot ("telebot") *Nemo* uses two cameras set slightly apart to serve as the "eyes" of the operators. Using 3-D vision, the team on board the surface vessel can direct *Nemo* to accurately grasp and retrieve artifacts and efficiently perform experiments. *Nemo's* stereo cameras, powerful illumination, and five camera booms for multiple perspectives are used in the most precise archaeological investigation ever to be recorded from start to finish. Three-dimensional images are transmitted to the surface vessel, allowing Columbus-America Discovery Group to have "telepresence" and excellent underwater depth perception without leaving the control room.

Illustrative of both the dramatic development of marine technology and the demands and benefits of ocean exploration, *Nemo's* operation is directed by a multi-disciplinary team of scientists and engineers who pool their knowledge and experience in a collegial approach to discovery from inside the ship's mission control center. *Nemo* absorbs sophisticated sensory information about the shipwreck and its environment and transmits the information directly to the mission control center aboard the research ship, where it is computer processed and instantly displayed for accurate analysis. *Nemo* can perform continuous operations at great depths and can carry along

a greater number of tools than manned submersibles and divers.

The impacts of exploration world-wide are certain to increase over time. With the advent of modern communications, whole nations have been able to participate in the process of discovery. *See Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 1989 AMC 1955, 1958 (E.D. Va. 1989) (discussing the doctrine of "telepresence"). *See generally* Drew F. T. Horrell, Note, *Telepossession Is Nine-Tenths of The Law: The Emerging Industry of Deep Ocean Discovery*, 3 Pace Y.B. Int'l L. 309 (1991).

B. Deep Sea Discovery, and Development and Enhancement of the Needed Marine Technologies, Are Vital National Concerns

The deep sea floor is many times larger than the surface world, and yet largely unexplored. George S. Fichter, *The Future Sea* 148 (1978). At present, only about five percent of the ocean floor has been adequately charted. Lloyd Mallon, *Secrets of the Sea* 40 (1965).

Exploration of long-lost and abandoned shipwrecks is an essential part of the requisite underwater discovery and provides a vehicle for continued technological inventiveness. *See The Sea Remembers* 7 (Peter Throckmorton ed., 1987); *see also* Christopher Lampton, *Undersea Archaeology* 12 (1988).

Like new eras of human discovery in the past, the emerging age of underwater exploration has stemmed from the freedom and incentives of individuals to explore. There has, since the Second World War, been a great increase in the pace of opportunities for individuals to participate in underwater discovery. Financial incentives have often provided impetus for many of these technological innovations associated with exploration. *See*

Jacques Cousteau, *The Ocean Worlds of Jacques Cousteau: Man Re-Enters the Sea* 16 (1974); *see also* Tzvetan Todorov, *The Conquest of America: The Question of the Other* 9 (1985).

Other important developments have opened up new opportunities for ocean exploration. Remotely operated vehicles (ROVs), which can now descend to depths of 20,000 feet, are used for a variety of purposes, including the location of mineral deposits and investigation of the planet's shifting tectonic plates. Equipped with mechanical arms, cameras, and sonar systems, ROVs permit a comprehensive view of the ocean depths for controllers on the surface. *The Sea Remembers* 220.

Using these improving technologies to explore long-lost and abandoned shipwrecks presents enormous opportunities to better understand the marine environment. A host of natural and social sciences, new fields of study, and opportunities are presented. The educational potential is enormous. *See generally The Sea Remembers* 9-10. And the potential resources are astounding; for example, it has been estimated that a fourth of all the gold and silver ever mined on earth is now on the seabed floor. Fichter, *supra*, 55.

These developments reflect "the policy of the United States to develop, encourage, and maintain a coordinated, comprehensive, and long-range national program in marine science for the benefit of mankind to assist in protection of health and property, enhancement of commerce, transportation, and national security, rehabilitation of our commercial fisheries, and increased utilization of these other resources." The Marine Resources and Engineering Development Act, 33 U.S.C. § 1101(a) (1988). Objectives expressed by Congress for the marine activities of the United States include:

(1) The accelerated development of the resources of the marine environment.

(2) The expansion of human knowledge of the marine environment.

(3) The encouragement of private investment enterprise in exploration, technological development, marine commerce, and economic utilization of the resources of the marine environment.

(4) The preservation of the role of the United States as a leader in marine science and resource development.

(5) The advancement of education and training in marine science.

(6) The development and improvement of the capabilities, performance, use, and efficiency of vehicles, equipment, and instruments for use in exploration, research, surveys, the recovery of resources, and the transmission of energy in the marine environment.

(7) The effective utilization of the scientific and engineering resources of the Nation, with close cooperation among all interested agencies, public and private, in order to avoid unnecessary duplication of effort, facilities, and equipment, or waste.

(8) The cooperation by the United States with other nations and groups of nations and international organizations in marine science activities when such cooperation is in the national interest.

33 U.S.C. § 1101(b) (1988).[1]

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[1] Congress has further found that:

(1) Technology and industrial innovation are central to the economic, environmental, and social well-being of citizens of the United States.

(2) Technology and industrial innovation offer an improved standard of living, increased public and private sector productivity, creation of new industries and employment opportunities, improved public services and enhanced competitiveness of United States products in world Markets.

. . . .

[Continued]

It is similarly the policy of the United States "to encourage the continued development of technology necessary to recover the hard mineral resources of the deep seabed." 30 U.S.C. § 1401(b)(5).

C. Responsible Deep Ocean Technology and Discovery Require Substantial Venture Capital, and Merit Predictable and Clear Title to Finds, and Failure to Award Clear Title Will Spur Secretiveness By Discoverers and Loss of Information to Society

Throughout its history, admiralty law has governed the rights of individuals, primarily on the surface of the seas. "But technological advances, which make possible the recovery of the *Central America*, including the use of side-scan sonar and robots, required that the law address new circumstances beneath the surface of the deep ocean." *The Emerging Law of Deep Ocean Discovery*, Harvard Law Bulletin 20 (Winter 1991).

The discovery and recovery of submerged and maritime historical cultural resources depends heavily on advanced and often costly specialized technologies. Such locational and recovery technologies as side-scan sonar, sub-bottom profilers, magnetometers, and remotely operated vehicles are often expensive, and only the best financed users can acquire and appy them. U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation–Background Paper*, OTA-BP-E-37 8 (1987).

The court of appeals' decision with regard to the maritime law of finds is significant and affects many scientific

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[1] [Continued]

(4) Small businesses have performed an important role in advancing industrial and technological innovation.

(5) Industrial and technological innovation in the United States may be lagging when compared to historical patterns and other industrialized nations.

15 U.S.C. § 3701 (1988).

institutions. If allowed to stand, the decision may well chill future deep ocean research and exploration and the attendant development of recovery technologies. The decision makes uncertain and unpredictable the financial incentives associated with technologically advanced discovery and recovery of deposits in the deep ocean, such as historic shipwrecks. The resulting lack of predictability will most likely make it difficult to attract the enormous sums of private risk capital—and the enterprising explorers—required for such tenuous and challenging ventures.

II. THE DECISION BELOW WARRANTS REVIEW IN ORDER TO CLARIFY THE RIGHTS ASSOCIATED WITH MARINE DISCOVERIES AND THE BURDEN OF PROOF ASSOCIATED WITH QUIETING TITLE TO CULTURAL DEPOSITS FOUND ON THE SEABED

The law in this country has traditionally sought to protect the rights of innovators, inventors, and discoverers. The close connections between discovery, freedom to discover, and economic incentives for discovery did not escape our nation's founders. *See, e.g.*, Arthur Miller & Michael Davis, *Intellectual Property* 7 (2d ed. 1990). The fact that the modern science of oceanography began in this country was not by chance.

The framers of the Constitution were aware that protecting discoverers and their "finds against unknown savages and unfriendly rivals," was of vital importance because they understood the linkage between discovery and invention. *See* Daniel J. Boorstin, *Discoverers and Inventors, in Inventors and Discoverers: Our Changing World*, 8 (National Geographic ed., 1988). In modern times, the role of exploration has been combined with that of invention, as exploration and invention "have been assimilated into a single community of questing mankind." *Id.* at 10. "The face of exploration began to change drastically during the course of the twentieth

century . . . . The technology necessary for these new steps was far more complex than anything required of previous generations, and the result was a move away from individual efforts toward enormous undertakings that relied on massive support crews . . . and astronomical bankrolls." Eric Flaum, *Discovery: Exploration Through the Centuries* 191 (1990). Indeed, Congress and the President have codified the nation's long-standing tradition of encouraging exploration and discovery in the oceans. Title 33 U.S.C. Section 1101(b) places within our national objectives "expansion of human knowledge of the marine environment," and "encouragement of private investment enterprise in exploration, technological development . . . and economic utilization of the resources of the marine environment." E. John Long, *New Worlds of Oceanography* 24-25 (1965).

The conflict in case law over application of the law of finds or the law of salvage to discoveries by explorers warrants the Court's attention. The decision below creates a conflict in the circuits regarding the rights of explorers to their finds. Paul S. Edelman, *Who Gets Treasure Recovered From Sea*, N.Y. L.J., Dec. 4, 1992, at 3, 4 (discussing the change in law effected by the Fourth Circuit opinion, concluding: "How the law of finds will turn out in cases on the high seas will need resolution by the Supreme Court.")

The uncertainty over the applicable body of law creates the very real risk that future explorers will not enjoy the fruits of their exploration because they may be confronted with possibly hundreds of claims of purported successors-in-interest of owners and insurers, all claiming to be "owners," and the unfortunate explorer may be forced to bear the enormous legal and economic burden of disproving dozens, if not hundreds, of stale claims. Yet, the costs and risks inherent in exploring the seas are difficult enough without a blight of litigation. *See* Long,

New Worlds 36; *see also* J. Barto Arnold, *The Platoro Lawsuit: The Final Chapter*, Proceedings of the Sixteenth Conference on Underwater Archaeology 1, 7 (1985) (describing the burdens on exploration resulting from protracted and expensive litigation under commercial salvage law). As the Court has stated as to analogous concerns with respect to undue claims to jurisdiction, "it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by the sea." *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953). At the very least, the uncertainty and lack of predictability created by this conflict in the applicable body of law chills exploration of long-lost wrecks, and more seriously, raises the specter of economically crippling certain elements of the emerging field of deep ocean discovery.

The uncertainty about the applicable body of law threatens future exploration by subjecting explorers to a host of lawsuits, many of which may be based on evidence scores of years old, and by placing upon the explorer the burden of disproving speculative, aged claims. Imposing a yoke of uncertainty, and in some instances expensive and lengthy litigation, could hamper future explorers who are already burdened by the enormous cost and risks inherent in exploring the unknown. Anne G. Giesecke, *To Be Or Not To Be Abandoned . . .* Sea Technology, Jan. 1993, at 93.

Conflict and confusion as to the applicable legal regime have a debilitating effect on deep sea discovery. Without predictable legal rights, innovators, inventors, and discoverers are paralyzed, and unable to attract the huge sums of private investment capital needed. As the Congress has recognized in another context; "[T]he uncertainty among potential investors as to the future legal regime is likely to discourage or prevent the investments necessary" to develop deep sea technology. 30 U.S.C. § 1401(a)(13).

Yet, the law has heretofore accorded substantial rights to discoverers. *See Martin v. Lessee of Waddell*, 41 U.S. 367, 409 (1842) (recognizing discovery as a foundation for ownership); *Dunbar v. Meyers*, 94 U.S. 187 (1876) (intellectual property rights associated with discovery); *U.S. v. Safe Investment Gold Mining Co.*, 258 F. 872, 877 (8th Cir. 1919). *See also Lampton*, *supra*, 86 (discussing rights of explorers in shipwrecks).

As a practical matter, it will be, difficult, if not impossible, to attract the kind of responsible investors needed to underwrite this combination of scientific investigation, historical analysis and entrepreneurship. Certainly, the marine insurance community has neither funded such efforts in the past, nor done anything whatsoever to promote them. And indeed, insurers claiming based on subrogation, like heirs of passengers, crew members and the host of other claimants created under the majority's emasculation of the law of finds, have no incentive to do so: unlike a finder, who is required, under the maritime law of finds, to protect the scientific and historical values of long-lost shipwrecks, these claimants are under no such duty. On the contrary, such claimants have virtually no incentive to do so and their financial interests are limited to only a small part of the value of the shipwreck site. Giesecke, *supra*, at 93.

The freedom of individuals to explore the deep seas and to enjoy the benefits of their exploration appears to be part of the elements of the traditional freedom of the seas underlying our nation's maritime jurisprudence. *See e.g.* 30 U.S.C. § 1401(a)(12); 30 U.S.C. § 1402(a). Predictability and certainty in legal rights are essential to the exercise of these freedoms by innovators and discoverers, and they and their discoveries should not be subjected to a host of conflicting legal regimes. On the contrary, they should enjoy a clear, certain reward, without their energies, creativity, and investment capital being consumed in expensive and protracted litigation over claims stale for hundreds of years.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. CRUMPLER, JR.
(Counsel of Record)
KAUFMAN & CANOLES, P.C.
NationsBank Center
Norfolk, Virginia 23514
(804) 624-3103
Counsel for Amicus Curiae